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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 ANNA HYUNG KIM,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of Social Security,

15 Defendant.
16

Case No. CV 17-3391-KK

ORDER DENYING PETITION FOR
ATTORNEYS' FEES UNDER THE
EQUAL ACCESS TO JUSTICE ACT

17 I.

18 **INTRODUCTION**

19 On May 2, 2018, Plaintiff's counsel, Cyrus Safa of the Law Offices of
20 Lawrence D. Rohlfing ("Counsel") filed a Petition for Attorneys' Fees Under the
21 Equal Access to Justice Act ("Petition"). ECF Docket No. ("Dkt.") 21. The
22 parties have consented to the jurisdiction of the undersigned United States
23 Magistrate Judge, pursuant to 28 U.S.C. section 636(c). Dkts. 11, 12. For the
24 reasons stated below, the Court DENIES the Motion.

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1 REVERSING the decision of the Commissioner and REMANDING this action for
2 further proceedings consistent with this Order.” Dkt. 20, Amended Order at 16.
3 The substance of the January 25, 2018 Order remained the same in the Amended
4 Order. Compare Dkt. 18, January 25, 2018 Order with Dkt. 20, Amended Order.

5 On May 2, 2018, Counsel filed a Petition for Attorneys’ Fees under the
6 Equal Access to Justice Act (“Petition”). Dkt. 21, Pet. at 1. Counsel argued his
7 petition was timely filed because he “calculated the final judgment date from
8 January 30, 2018.” Id. at 5.

9 On May 22, 2018, Defendant filed an opposition, arguing Plaintiff’s Petition
10 was untimely because the final judgment date should be calculated from January 25,
11 2018. Dkt. 22, Opp. at 3.

12 III.

13 DISCUSSION

14 **PLAINTIFF’S COUNSEL IS NOT ENTITLED TO FEES** 15 **UNDER THE EQUAL ACCESS TO JUSTICE ACT BECAUSE** 16 **COUNSEL’S PETITION IS UNTIMELY**

17 **A. APPLICABLE LAW**

18 Under the Equal Access to Justice Act, “[a] party seeking an award of fees
19 and other expenses shall, within thirty days of the final judgment in the action,
20 submit to the court an application for fees and other expenses.” 28 U.S.C. §
21 2412(d)(1)(B). “[W]hen the time for seeking appellate review has run,” the
22 Court’s judgment remanding for further proceedings becomes a “‘final judgment’
23 as used in § 2412(d), which is defined to mean ‘a judgment that is final and not
24 appealable.’” 28 U.S.C. § 2412(d)(2)(G); Shalala v. Schaefer, 509 U.S. 292, 298,
25 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993). An appealing party has sixty-days after
26 entry of the judgment or order appealed to file a notice of appeal. Fed. R. App. P.
27 4(a)(1)(B); Hoa Hong Van v. Barnhart, 483 F.3d 600, 607 (9th Cir. 2007)
28 (concluding a judgment becomes final in a social security matter “when the 60-day

1 post-judgment appeal period has run”). If a party timely files a motion to alter or
2 amend the judgment under Federal Rule of Civil Procedure 59, the time to file an
3 appeal runs for all parties from the entry of the order disposing of the last such
4 remaining motion.” Fed. R. App. P. 4(a)(4)(A)(iv).

5 The period for review is not tolled every time a judgment is revised “in an
6 immaterial way”. FTC v. Minneapolis-Honeywell Regulator, Co., 344 U.S. 206,
7 211-12, 73 S. Ct. 245, 97 L. Ed. 245 (1952). Instead, the period is tolled “when the
8 lower court changes matters of substance, or resolves a genuine ambiguity” in a
9 prior judgment. Id. at 211. “The test is a practical one. The question is whether
10 the lower court, in its second order, has disturbed or revised legal rights and
11 obligations which, by its prior judgment, had been plainly and properly settled with
12 finality.” Id. at 212. “If the later judgment is entered merely to correct a ‘true
13 clerical error,’ the date of judgment is not affected.” United States v. Geophysical
14 Corp. of Alaska, 732 F.2d 693, 701 (9th Cir. 1984). “Where the amendment is a
15 ‘material change’ that affects the parties’ rights or the decision to appeal, the
16 judgment on the motion to amend does initiate a new appeal period.” Id.

17 For instance, in County of Imperial v. United States, the district court
18 amended the judgment twice. In the first amended judgment, the court added a
19 description of a second parcel to the real property described in the original
20 judgment. Id. In the second amended judgment, the court corrected a “clerical
21 error,” and changed a March 8, 1959 date to March 1, 1959. Id. The Ninth Circuit
22 held the first amended judgment revised the judgment in a “material” way by
23 altering the “true date of the entry of the judgment.” Id. In contrast, the Ninth
24 Circuit found the second amended judgment was “immaterial,” because it simply
25 corrected a “true clerical error,” and thus “affected no parties’ rights.” Id.

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1 **B. ANALYSIS**

2 Here, Counsel failed to timely file the instant Motion. The Court issued
3 Judgment reversing Defendant's decision denying Plaintiff's benefits and
4 remanded the matter for further administrative proceedings on January 25, 2018.
5 Dkt. 9. No amended judgment was ever issued. Plaintiff's judgment, thus, became
6 final on March 26, 2018 – sixty days after the Court's Judgment on January 25,
7 2018. See Judg. Hence, Counsel had thirty days, until April 25, 2018, to file a
8 motion for EAJA fees. See 28 U.S.C. § 2412(d)(1)(B). The Motion, which was not
9 filed until May 2, 2018, is untimely by seven days.

10 Counsel cites to Barry v. Bowen, 825 F.2d 1324, 1328-29 (9th Cir. 1987) for
11 the proposition that equitable tolling is warranted "where the fee applicant
12 reasonably relied on the district court's amended judgment in assuming the
13 deadline for appeal ran from the amended judgment rather than the original
14 judgment". Pet. at 5-6. Barry, however, is distinguishable because the amended
15 order changed the initial judgment in a "material way." In Barry, the court's initial
16 judgment concluded: "The determination of the Secretary is reversed and
17 remanded." 825 F.2d at 1328-29. The Secretary then filed a "Motion for
18 Clarification" seeking clarification of the court's order "in regard to whether
19 benefits are to be awarded at this time or whether additional administrative
20 proceedings are to be conducted." Id. Following the motion, the district court
21 modified its judgment to state: "For the sake of clarification, IT IS HEREBY
22 ORDERED that the case is remanded to the Secretary for the limited purpose of
23 effectuating the payment of Social Security disability insurance benefits to the
24 plaintiff." Id. Because the modified judgment clarified a substantive issue, the
25 Ninth Circuit found the date of the amended judgment was the date when the time
26 for appeal began to run. Id.

27 In contrast to Barry, here, there was no amended judgment. Further, the
28 Court's change in the Amended Order is similar to the "clerical" change in the

1 first amended judgment in County of Imperial and unlike the “material change” in
2 the second amended judgment in County of Imperial or the first amended
3 judgment in Barry. First, the Amended Order did not “disturb[] or revise[] legal
4 rights and obligations” of the parties. See FTC, 344 U.S. at 211. The parties were
5 aware of the correct judgment as described in the Judgment, without the
6 “recommending” language of the January 25, 2018 Order, when the Judgment
7 went out on the same day. Significantly, the parties had consented (and the case
8 had been reassigned to the undersigned Magistrate Judge) over six months prior to
9 the issuance of the January 25, 2018 Order. Thus, the parties were well aware that
10 the “recommending” language was simply a clerical mistake. Second, the
11 Amended Order on January 30, 2018 merely tracked the language of the Judgment.
12 Compare Dkt. 20, Amended Order with Dkt. 19, Judg. The Amended Order did
13 not create any new rights for the parties, give parties any reason to change their
14 decision whether or not to appeal, modify the Judgment in any way, or resolve any
15 genuine ambiguity in the January 25, 2018 Order. Third, unlike Barry where a
16 party filed a motion for the court to amend seeking clarification on matters of
17 substance, the Court, on its own accord, issued the Amended Order to clarify
18 matters already known to the parties. Finally, unlike the first amended judgment in
19 County of Imperial where the amendment materially altered parties’ rights by
20 adding a second parcel to real property described in the initial judgment, the
21 Amended Order adds nothing that was not already stated to the parties in the
22 Judgment. As such, January 25, 2018, the date of the Judgment, was the correct
23 day for parties to use to calculate the final judgment date.

24 As Counsel filed the instant Petition seven days after the deadline passed,
25 the Court finds the Motion untimely and consequently denies the request for EAJA
26 fees. See Arulampalam v. Gonzales, 399 F.3d 1087, 1089 (9th Cir. 2005) (“We
27 have held that the thirty day limitation period under the EAJA for submitting fee
28 applications . . . should be narrowly construed, as it is a waiver of sovereign

1 immunity.” (internal citation and quotations omitted)); Moua v. Colvin, No. 1:13-
2 CV-00373-BAM, 2015 WL 3991170, at *2 (E.D. Cal. June 30, 2015) (denying a
3 motion for EAJA fees that was filed one day after the filing deadline passed).

4 **IV.**

5 **ORDER**

6 Based on the foregoing, IT IS HEREBY ORDERED Plaintiff’s Counsel’s
7 Petition for Attorneys’ Fees Under the Equal Access to Justice Act is DENIED.

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10 Dated: June 18, 2018



11 HONORABLE KENLY KIYA KATO
12 United States Magistrate Judge
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